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FILED/ACCEPTED

August 30, 2012

AUG 30 2012

VIA HAND DELIVERY

Federal Communications Commission
Office of the Secretary

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: **REDACTED - FOR PUBLIC INSPECTION**
Project Concord, Inc. v. NBCUniversal Media, LLC (AAA Case No. 72-472-E-01147-11)
MB Docket No. 10-56

Dear Ms. Dortch:

Enclosed are an original and two (2) copies of the Reply In Support Of Petition For *De Novo* Review, submitted on behalf of NBCUniversal Media, LLC ("NBCUniversal") in the above-captioned proceeding.

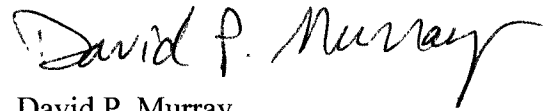
This Public version has been redacted consistent with the procedures directed by Media Bureau staff, and for the reasons detailed in the Request for Confidential Treatment submitted with the Confidential version of the filing on August 10, 2012. NBCUniversal is also today serving a copy of the Public version of the filing via hand delivery to Monica Desai, counsel for Project Concord, Inc.

If you have any questions, please do not hesitate to contact me.

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Marlene H. Dortch
August 30, 2012
Page 2

Very truly yours,

A handwritten signature in black ink that reads "David P. Murray". The signature is fluid and cursive, with the first name "David" and last name "Murray" clearly legible.

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Counsel for NBCUniversal Media, LLC

cc: William T. Lake, Chief, Media Bureau
Sarah Whitesell, Deputy Chief, Media Bureau
Martha Heller, Deputy Division Chief, Industry Analysis Division, Media Bureau
Monica Desai, Counsel for Project Concord, Inc.
John M. Genga, Counsel for Project Concord, Inc.

Enclosures

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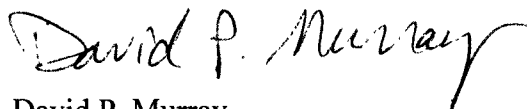
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Enclosures

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED

AUG 30 2012

Federal Communications Commission
Office of the Secretary

In the Matter of Arbitration between)
Project Concord, Inc.,)
Claimant,)
-vs.-)
NBCUniversal Media, LLC,)
Respondent.)
_____)

File No. _____
MB Docket No. 10-56

To: The Commission
Attention: Chief, Media Bureau

REPLY IN SUPPORT OF PETITION FOR *DE NOVO* REVIEW

WILLKIE FARR & GALLAGHER LLP
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Washington, D.C. 20006-1238
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I. INTRODUCTION AND SUMMARY

NBCUniversal seeks Commission review of the Arbitrator's rulings that: (1) films less than one year from theatrical release are included in the definition of "Video Programming" subject to the Benchmark Condition; (2) NBCUniversal's contract defenses are premature and speculative because [REDACTED] [REDACTED] due to the [REDACTED] and (3) the relevant provisions of the *Order* defer any ruling on such contract defenses until Phase 2 of a Benchmark arbitration.

In its Opposition, PCI argues that the Commission intended for the definition of "Video Programming" to be broadly construed, based primarily on the boilerplate "includes but is not limited to" language in the provision, and would not have purposefully excluded first year films "*without any explanation.*"¹ In fact, the Commission said all that it needed to say by expressly limiting the scope of films covered by the definition to those "for which a year or more has elapsed since their theatrical release." The plain language of the *Order* must be given its proper meaning and effect. It is not for the Arbitrator (or PCI) to second-guess whether the Commission should have provided some additional explanation for this decision.

PCI also argues that the "pro-competitive" purposes of the Benchmark Condition are meant to force NBCUniversal to provide the exact same programming as "a similarly situated content provider," including first-year films where applicable.² But the Commission chose *not* to impose such a requirement for first-year films, and for good reason. As shown in

¹ Project Concord, Inc. Opposition To NBCUniversal Media Petition For De Novo Review ("PCI Opp.") at 16 (emphasis in original). Defined terms have the same meaning as set forth in NBCUniversal's Petition For *De Novo* Review ("NBCUniversal Pet.") and Opposition To Project Concord, Inc.'s Partial Appeal ("NBCUniversal Opp.").

² PCI Opp. at 12.

NBCUniversal's Petition, the Commission knew that NBCUniversal has license agreements for its films with [REDACTED] that were in place long before the transaction. The peer studios either do not have license agreements with [REDACTED] (i.e., they have agreements with [REDACTED]) or have different licensing arrangements with [REDACTED], and thus are not "similarly situated" to NBCUniversal in this respect. The exclusion of first-year films was specifically negotiated during the transaction review so that NBCUniversal would not be put in the untenable position of having to match a peer studio's licensing of first-year films in contravention of NBCUniversal's commitments to [REDACTED] which could alter the marketplace for this valuable programming and [REDACTED] – as well as [REDACTED] – under the parties' agreements. The Arbitrator erred by substituting his views about the policies underlying the *Order* for the judgments made and lines drawn by the Commission (and DOJ) during the transaction review process.

PCI also contends that the Arbitrator properly found that NBCUniversal failed to prove by a preponderance of the evidence that providing certain film and TV content to PCI would constitute a breach of other NBCUniversal license agreements. But, as shown in NBCUniversal's Petition, the Arbitrator *declined* to rule on the contract defenses and instead left them for resolution "without prejudice" when these licensees become [REDACTED] [REDACTED] breaches their agreements. This "breach first/fix later" approach is bad policy and plainly erroneous.

PCI further denies that its service has any [REDACTED] that would breach these other NBCUniversal license agreements. When parsed, however, PCI's characterizations of its service are based on the pretense that the [REDACTED]. They are not. [REDACTED]

The programming is being [REDACTED], and, like every other [REDACTED]
[REDACTED] Notably, in its Opposition,
PCI acknowledges “the common industry view that [REDACTED]
[REDACTED]
[REDACTED]³ Because PCI [REDACTED]
[REDACTED] but instead are conditioned on [REDACTED]
[REDACTED] PCI’s service is indisputably [REDACTED]
[REDACTED] under this “common industry view.” The Arbitrator likewise found the [REDACTED]
[REDACTED] of PCI’s service to be [REDACTED]⁴ and while he declined to rule on
NBCUniversal’s contract defenses, he nonetheless offered “observations” that some of the
contracts *may indeed be breached*.⁵ In fact, all of them would be breached for the reasons shown
in the Petition.

Finally, PCI argues that the ambiguity in the *Order* over when contract defenses should
be addressed in Benchmark arbitrations (i.e., in Phase 1 or Phase 2) had no effect on the outcome
here and thus is “inappropriate” for clarification in this appeal. As the author of the condition,
the Commission has authority to clarify its intended procedures. And because this same issue is
likely to arise in future Benchmark arbitrations, it is not only appropriate for the Commission to
clarify this procedural ambiguity, but incumbent upon the Commission to do so. The
Commission should thus clarify that the contract defenses authorized under the Benchmark
Condition are to be considered and decided during Phase 1 of an arbitration.

³ *Id.* at 46 (citation omitted).

⁴ Phase 1 Dec’n at 10.

⁵ Phase 2 Award at 9-10.

II. FIRST-YEAR FILMS ARE EXPRESSLY EXCLUDED FROM THE SCOPE OF VIDEO PROGRAMMING SUBJECT TO THE BENCHMARK CONDITION.

The definition of “Video Programming” in the *Order* plainly states, with respect to film, that it only encompasses “[f]ilms for which a year or more has elapsed since their theatrical release.”⁶ Rather than giving this plain language its proper meaning and effect, the Arbitrator substituted his views about the policies underlying the *Order*. This was an error.

As the Commission knows, the exclusion of first-year films was specifically adopted during the transaction review to ensure that NBCUniversal was not obligated under the Benchmark Condition to match the licensing practices of a peer studio with respect to newly-released films that NBCUniversal has already licensed to others. Most notably, NBCUniversal has longstanding and [REDACTED].⁷ These agreements long pre-date the transaction with Comcast. Because of this contractual relationship with [REDACTED] NBCUniversal is in a different position from the peer studios identified in the Benchmark Condition, several of which do not have [REDACTED] and all of which may have different terms and conditions for their licensing arrangements. As a result, NBCUniversal could suffer [REDACTED] if it was required under the Benchmark Condition to license newly-released films based on the practices of a peer studio.⁸ Among other things, [REDACTED]
[REDACTED]

⁶ *Order*, App. A, § I.

⁷ *See* Ex. 35 (full set of [REDACTED]).

⁸ NBCUniversal Pet. at 15-16 & n.46.

_____.⁹ _____ settled rights and interests in the films could also be adversely affected. To protect against these potentially _____ the Commission – like DOJ – chose to exclude first-year films from the scope of the compulsory licensing regime imposed under the Benchmark Condition. This was a deliberate and informed decision made by both agencies, and is neither perplexing, as the Arbitrator wrongly concluded,¹⁰ nor the product of “inartful” drafting,” as PCI contends.¹¹

In its Opposition, PCI describes at length its views about the pro-competitive policies underlying the Benchmark Condition, asserting that it “serves as a proxy for how NBCU would have behaved in the marketplace absent the acquisition by Comcast”¹² In fact, NBCUniversal’s contracts with ██████ existed long before the transaction. It was entirely appropriate for the Commission (and DOJ) to recognize and preserve that long-term contractual relationship under the conditions.¹³ PCI further asserts that the Benchmark Condition is designed to force NBCUniversal to match the licensing practices of “a similarly situated content provider.”¹⁴ But that contention goes to the heart of why the Commission (and DOJ) chose not to include first-year films. As noted above, the peer studios are not “similarly situated” to

⁹ *Id.* at n.46.

10 Phase 1 Dec. at 5.

¹¹ HT 45:10-12 (MacHarg).

¹² PCI Opp. at 12.

¹³ The Commission’s decision here is akin to other provisions in the conditions where (like DOJ) the Commission protected and preserved pre-existing (and future) “agreements or arrangements consistent with reasonable, common industry practice.” *Order*, App. A, § IV.B; *see also* DOJ Final Judgment, § V.B-C.

¹⁴ PCI Opp. at 12.

NBCUniversal with respect to [REDACTED], and so forcing NBCUniversal to match the licensing practices of a peer studio for newly-released films could trigger [REDACTED] under NBCUniversal's agreements with [REDACTED]. It would have been unfair and unwarranted for the Commission (or DOJ) to put NBCUniversal in such an untenable position or to abrogate [REDACTED] long-established rights and interests in this programming.

PCI asserts that NBCUniversal has simply "imagine[d]" that the Commission (like DOJ) made this deliberate policy decision based on the [REDACTED] relationship because "there is absolutely no evidence in the record that the FCC did any such thing."¹⁵ In fact, the Commission directly spoke to its decision in the most relevant part of the *Order*: when it defined the scope of "Video Programming" subject to the Benchmark Condition. By expressly limiting covered films to those "for which a year or more has elapsed since their theatrical release," the Commission placed first-year films outside this unprecedented compulsory licensing regime. In doing so, the Commission (like DOJ) said all that it needed to say about its policy choice.¹⁶ The Commission was not required to provide some further "explanation" for it, as PCI wrongly contends.¹⁷

¹⁵ *Id.* at 14-15.

¹⁶ *See Dir., Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-36 (1995) (In rejecting "the proposition that the statute at hand should be liberally construed to achieve its purposes," the Court held: "That principle may be invoked, in case of ambiguity, to find present rather than absent elements that are essential to operation of a legislative scheme; but it does not add features that will achieve the statutory 'purposes' more effectively. Every statute purposes, not only to achieve certain ends, but also to achieve them by particular means . . ."); *see also Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2044 (2012) ("Vague notions of statutory purpose provide no warrant for expanding [the statutory provision's application] beyond the field to which it is unambiguously limited.").

¹⁷ The Commission further addressed the exclusion of first-year films in instructing parties (and arbitrators) on what constitutes "Comparable Programming." As specified in the *Order*, "(x) Films less than five years from initial theatrical distribution" are not comparable to "(y) Films over five years from initial theatrical distribution." *Order*, App. A, § I. Films within these two categories, conversely, are comparable. NBCUniversal can satisfy its obligations for newer

PCI next contends that access to first-year films “is critical to the ability of OVDs to compete with Comcast’s traditional PPV and VOD services and programming widely available on other OVDs”¹⁸ This argument is overstated and, in all events, simply reflects PCI’s disagreement with the policy choice made by the Commission (and DOJ) in crafting the Benchmark Condition. Competition among services offering current films on demand directly to consumers is robust; NBCUniversal already licenses such films to numerous online transactional VOD services (e.g., iTunes, Vudu, YouTube) that compete with traditional PPV/VOD services.¹⁹ In addition, at least two of the more successful OVD business models identified by the Commission and DOJ during the transaction review, Netflix and Hulu, have gained significant market share by focusing on providing other categories of film and television content.²⁰ Based on this and other extensive industry evidence compiled during the transaction review, the

films by providing a film for which two or more (but less than five) years has elapsed. This may result in some “difference in the value of the programming being sought relative to the Comparable Programming,” but that is addressed through a price adjustment. *Id.*, App. A, § IV.A.2.b.(ii). It does not affect the scope of the compulsory licensing obligations.

¹⁸ PCI Opp. at 16.

¹⁹ See Ex. 40A-Z (NBCUniversal’s licensing agreements in evidence with [REDACTED] services).

²⁰ Netflix’s online subscription service “primarily consists of relatively older movies and past-season television shows.” *Order* ¶ 63. Netflix “has grown substantially in the last several years, from 7.5 million subscribers at the end of 2007 to 16.9 million in the third quarter of 2010.” DOJ Competitive Impact Statement (“DOJ CIS”) § II.C.2. As the Commission observed in its latest Video Competition Report, Netflix has thrived and developed innovative ways for OVDs to acquire and distribute studios’ content, despite the fact that Netflix does not generally offer new major studio films. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Report, FCC 12-81, ¶¶ 301-303 (July 20, 2012) (“14th Video Competition Report”). Hulu is another successful ad-supported OVD that, in DOJ’s words, “has experienced substantial growth since its launch in 2008, reaching 39 million unique viewers by February 2010.” DOJ CIS § II.C.2; see also *Order* ¶ 63 & n.134. Like Netflix, Hulu does not generally exhibit major studio first-year films either. See 14th Video Competition Report ¶¶ 299-300 (discussing range of content available on Hulu, including “full-length movies – often library content several years or decades old”).

Commission – like DOJ – appropriately exercised its expert judgment in striking a balance that is intended to promote OVD competition while preserving reasonable exclusivity and windowing practices like those reflected in NBCUniversal’s agreements with [REDACTED]. In particular, both agencies struck that balance with respect to films by expressly excluding those less than one year from theatrical release from the scope of Video Programming subject to the Benchmark Condition.²¹ This plain language must be given its proper meaning and effect, regardless of whether PCI (or the Arbitrator) disagrees with the agencies’ policy decision.²²

PCI further argues that the boilerplate “includes but is not limited to” language in the definition of Video Programming indicates that the Commission meant to include first-year films, despite the express, more specific language limiting covered films to those “for which a year or more has elapsed since their theatrical release.” As shown in the Petition, this argument improperly reads the more specific language used by the Commission out of the definition, in

²¹ *Order* ¶ 73 & n.157 (“We do not conclude that agreements giving specific video distributors exclusive rights to video content necessarily or invariably harm competition, only that absent conditions, the transaction before us gives Comcast an increased ability and incentive to reach such agreements for anticompetitive reasons.”); DOJ CIS § III.A.4 (The “proposed Final Judgment strikes a balance by allowing reasonable and customary exclusivity provisions that enhance competition while prohibiting those provisions that, without any offsetting procompetitive benefits, hinder the development of effective competition from OVDs.”).

²² Although first-year films are excluded from the compulsory licensing regime, NBCUniversal from the start has been willing to license films to PCI that are available before (and at various points after) the earliest window of the [REDACTED] agreements, provided PCI [REDACTED]

[REDACTED] In addition, [REDACTED]

NBCUniversal from the start has been willing to go to [REDACTED] [REDACTED] will permit NBCUniversal to provide these early films to PCI. HT 605:16-606:15 (Murray). PCI has not only thwarted those efforts but (contrary to the gloss in its Opposition (n.32)) has threatened to sue NBCUniversal if it makes any such effort “by going to [REDACTED] and trying to make trouble” PCI Opp. at 8 n.32.

disregard of the Commission's plain intent and in violation of cardinal rules of statutory construction.²³ Indeed, the Commission separately defined "Film" in the *Order* as "a feature-length motion picture that has been theatrically released."²⁴ This encompasses the universe of all such film content from its moment of birth. If the Commission intended to make all films subject to compulsory licensing, as PCI wrongly contends, the definition of "Video Programming" would have simply said "Films," and not "Films for which a year or more has elapsed since their theatrical release."²⁵

PCI similarly points to the references to VOD, PPV, and TVOD in the definition of Video Programming, arguing that because these offerings may include newer film titles, they should likewise be read to override the plain language the Commission used to limit covered films to those more than a year from theatrical release.²⁶ This again would read the more specific limiting language for films out of the definition, improperly rendering the Commission's words superfluous.²⁷ Properly construed, the terms VOD, PPV, and TVOD in the definition

²³ NBCUniversal Pet. at 14; *see also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071-72 (2012) (applying the canon that "the specific governs the general," and observing that the canon avoids a result in which "a specific provision . . . is swallowed by the general one, violating the cardinal rule that, if possible, effect shall be given to every clause and part of a statute" (internal quotation marks and alteration omitted)).

²⁴ *Order*, App. A, § I.

²⁵ PCI also theorizes that the express reference to films a year or more from theatrical release was meant to cover "older films [that] were not originally shot in digital form." PCI Opp. at 20. This fails for the same reason and is far-fetched on its face. The Commission's definition of "Film" covers the universe of all theatrically-released films, whether or not digitized.

²⁶ PCI Opp. at 17-18.

²⁷ *See, e.g., Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934*, 16 FCC Rcd 9751, ¶ 20 (2001) (stating that, "we are obligated to interpret statutory language in a manner that gives meaning to each word – if at all possible –

refer to different methods by which video media are distributed. And to the extent these methods are used to distribute film, the Commission expressly spoke for that medium in its own separate and specific part of the definition – namely, to mean only “[f]ilms for which a year or more has elapsed since their theatrical release.”²⁸

Finally, PCI contends that the parallel Benchmark condition and *exact same* definition of Video Programming adopted by DOJ in its Consent Decree have no relevance to the Commission’s intentions under the *Order* with respect to first-year films.²⁹ That is plainly incorrect. The transaction review record shows that the Commission and DOJ “consulted extensively with [each other] to ensure that the agencies conducted their reviews in a coordinated and complementary fashion and created remedies that were both comprehensive and *consistent*.”³⁰ As shown in the Petition, DOJ – just like the Commission – chose to limit films covered by the definition of “Video Programming” to those “for which a year or more has elapsed since their theatrical release.”³¹ DOJ’s decision to exclude first-year films from the scope of its parallel Benchmark Condition is directly relevant to the Commission’s intent here, because it reflects a deliberate and careful effort by both agencies to adopt consistent remedies.

over an interpretation that renders certain words superfluous,” and finding an alternate interpretation “violates basic canons of statutory construction by giving no independent meaning” to the relevant provisions); *Application of BellSouth Corp. for Provision of In-Region, InterLATA Services in La.*, 13 FCC Rcd 20599, ¶ 29 n.67 (1998) (“[S]tatutes must not be interpreted in a manner that makes an exception mere surplusage.”).

²⁸ *Order*, App. A, § I.

²⁹ PCI Opp. at 20-22. Elsewhere in its Opposition, PCI cites approvingly to the DOJ Consent Decree when it suits PCI’s purposes. *See, e.g., id.* at 11 & n.44.

³⁰ DOJ CIS § II.A.4 (emphasis added).

³¹ DOJ Final Judgment § II.EE.

This confirms that *neither* agency intended to disrupt NBCUniversal's reasonable, longstanding practices with [REDACTED] for newly-released films by including those films in a compulsory licensing regime.³²

Accordingly, the Commission should reverse the Arbitrator and give proper meaning and effect to the plain language of the *Order* limiting the scope of films subject to the Benchmark Condition to those "for which a year or more has elapsed since their theatrical release."

III. THE ARIBTRATOR APPLIED AN ERRONEOUS "BREACH FIRST/FIX LATER" STANDARD.

As shown in the Petition, the Arbitrator "observed" that at least some of NBCUniversal's license agreements would likely be breached by the provision of certain film and TV content to PCI, while other license agreements could be decided either way.³³ He nonetheless declined to rule on the contract defenses, "without prejudice," because other NBCUniversal licensees had not yet [REDACTED]

[REDACTED]³⁴ This "breach first/fix later" standard is plainly erroneous, bad policy, and renders the contract defenses unworkable.

In its Opposition, PCI asserts that the Arbitrator ruled on the "merits" by holding that NBCUniversal failed to meet its burden of proof that the representative contracts would be

³² PCI quotes selected post-transaction review comments by a DOJ official describing the Consent Decree. PCI Opp. at 21 & n.78. These comments say nothing about films less than one year from theatrical release, nor do (or could) they ever override the express language in the decree.

³³ Phase 2 Award at 9-10; *see also* NBCUniversal Pet. at 29-40.

³⁴ Phase 2 Award at 8-10.

breached.³⁵ But as the Final Award makes clear, this “ruling” was based on the Arbitrator’s mistaken view that NBCUniversal could only meet its burden by proffering evidence of an actual claim of breach by another NBCUniversal licensee, which he found to be “lacking” in the arbitration record.³⁶ That is the wrong standard. Under the Benchmark Condition, the Commission intended for arbitrators to determine whether providing certain programming to an OVD claimant “would constitute a breach” of other NBCUniversal license agreements – and not to punt the question for some later proceeding once other NBCUniversal licensees actually assert claims of breach. Properly understood, the “would constitute a breach” standard requires a straightforward assessment of whether the relevant contract language restricts or prohibits the provision of certain programming to an OVD claimant.³⁷ Notably, PCI does not (and cannot) dispute the applicability of the Commission’s prior precedent for this standard,³⁸ which – if properly followed here – would have been easily met by NBCUniversal.

Indeed, the contract defenses are there to *avoid* breaches of the rights and interests of other licensees in NBCUniversal programming, not to require evidence of them. Moreover, because other NBCUniversal licensees do not participate in these arbitrations and, due to the confidentiality constraints established by the Commission, may be [REDACTED]

³⁵ PCI Opp. at 25-31.

³⁶ Phase 2 Award at 9-10.

³⁷ NBCUniversal Pet. at 18-19 (discussing the standard in the Commission’s closed captioning rule).

³⁸ See PCI Opp. at 26 n.92, 28-29 & n.105.

[REDACTED] NBCUniversal could never satisfy the burden of proof imposed by the Arbitrator. His “merits” ruling renders the contract defenses unworkable.³⁹

PCI also seriously misstates how NBCUniversal’s contract defenses were presented during the arbitration. NBCUniversal did not “paraphrase” and “mischaracterize” the relevant contract language, as PCI wrongly contends.⁴⁰ NBCUniversal instead cited and quoted *verbatim* the relevant language from each of the contracts, in its briefs, written fact testimonies, expert reports, and accompanying exhibits. Further, at the Arbitrator’s request, NBCUniversal “spoon-fed” this contract language to him in *verbatim* excerpts in its post-hearing briefs at the conclusion of Phase 1.⁴¹ and supplied him with additional charts excerpting and highlighting *verbatim* the relevant provisions at the conclusion of Phase 2.⁴² The arbitration record thus makes clear that the relevant contract provisions were fairly and properly presented.⁴³ The

³⁹ NBCUniversal Pet. at 18-24.

⁴⁰ PCI Opp. at 23, 29.

⁴¹ HT 531:13-14 (Arb. Silberberg).

⁴² NBCUniversal Phase 2 Clos. Br., Ex. A; *see also* NBCUniversal Pet., App. B, C.

⁴³ PCI also asserts that NBCUniversal relied on speculative expert testimony and failed to produce an in-house NBCUniversal attorney as a witness. PCI Opp. at 28-30. In fact, three NBCUniversal business executives who manage these contracts on a daily basis testified about the relevant restrictions. *See* Cas. Decl., Lam. Decl., Rob. Decl. NBCUniversal’s experts confirmed this testimony. *See* Mad. Decl., Wund. Decl. There was no need to call an in-house attorney, whose appearance (as the Arbitrator acknowledged) could have created thorny privilege issues. HT 772:16-17 (Arb. Silberberg). Nor would it have made any difference to the Arbitrator’s ruling, given the “breach first/fix later” standard he ultimately employed. As shown in the Petition, the Arbitrator speculated about [REDACTED] future performance under the Peer Deal

[REDACTED] rejected NBCUniversal’s Phase 2 Final Offer (which was the [REDACTED] of the Peer Deal) based on the same speculation, yet found it to be too speculative to decide if NBCUniversal’s licensees would actually stand on *their* clear rights in *their* contracts (rather than assessing these rights based on the relevant contract language and related evidence, which is all the *Order* requires). *See* NBCUniversal Pet. at 8. PCI also cites a portion of Mr. Madoff’s

Arbitrator's "observations" about the contracts in the Final Award further show that he not only reviewed the applicable language but found that some of the contracts *likely would be breached* by the provision of certain film and TV content to PCI.⁴⁴ However, because none of these other NBCUniversal licensees [REDACTED], he wrongly determined that the contract defenses were too "speculative."

The Arbitrator's ruling that the contract defenses were not adequately established, therefore, was based on an erroneous "breach first/fix later" standard. It was not a result of any failure by NBCUniversal to show that providing certain content to PCI would constitute a breach of the contracts – which the Arbitrator himself expected would be the case in many instances.

IV. THE [REDACTED] OF PCI'S SERVICE VIOLATES THE RELEVANT NBCUNIVERSAL LICENSE AGREEMENTS.

A. The Distinguishing Aspect Of PCI's Service Is The Ability For Its Users To Obtain Licensed Content [REDACTED].

In its Opposition, PCI describes itself as a "traditional transactional video on demand" service that will not violate the [REDACTED] of content in the relevant NBCUniversal license agreements.⁴⁵ At the same time, PCI claims that its service is

testimony relating to [REDACTED], claiming that it shows the contract defenses were [REDACTED] PCI Opp. at 51. In fact, Mr. Madoff was testifying about NBCUniversal's Phase 2 Final Offer, which would have permitted NBCUniversal to [REDACTED] [REDACTED] before providing any NBCUniversal content that might breach NBCUniversal's obligations to [REDACTED]. HT 847:9-11 (MacHarg) ("What kind of content does [NBCUniversal] intend to provide to PCI *under the NBCU final offer?*") (emphasis added). Mr. Madoff elsewhere testified that, absent an [REDACTED], he believes providing certain of the film content that PCI has demanded *will* constitute a breach of NBCUniversal's [REDACTED] agreements. HT 151:7-154:16; HT 879:3-883:15 (Madoff); Mad. Decl. ¶ 40; Mad. Sec. Decl. ¶¶ 8-11.

⁴⁴ Phase 2 Award at 9-10.

⁴⁵ PCI Opp. at i, 31-32.

distinctive because it [REDACTED]

[REDACTED]⁴⁶ This indeed

distinguishes PCI from genuine TVOD services. And the [REDACTED]

[REDACTED]⁴⁷

[REDACTED] but rather has existed

since the advent of broadcast television.⁴⁸ Once the pretense that PCI users [REDACTED]

[REDACTED] PCI's theory for why it is not [REDACTED] collapses.

PCI starts by trying to separate its [REDACTED] PCI
portrays its [REDACTED] as a traditional VOD/EST service, where [REDACTED]

[REDACTED]⁴⁹ But this hides the
ball. The critical element of PCI's service is its [REDACTED]

[REDACTED] The user's viewing of the licensed content is thus being [REDACTED].

PCI further asserts that its users can view a licensed film or TV show [REDACTED]
[REDACTED]. But that
too is irrelevant. PCI's [REDACTED]

⁴⁶ PCI Opp. at 3.

⁴⁷ See Ex. 9, [REDACTED]

⁴⁸ Mad. Sec. Decl. ¶ 4; HT 80:13-19 (Roberts); HT 448:9-22 (Marenzi).

⁴⁹ PCI Opp. at 39.

[REDACTED] In both instances, the viewer's [REDACTED]
[REDACTED] for viewing the licensed film or TV show.⁵⁰

Because PCI [REDACTED] are [REDACTED]
[REDACTED]
[REDACTED]⁵¹

PCI's own expert acknowledged that there is [REDACTED]
[REDACTED]⁵² PCI
encourages users to act on these incentives:

- [REDACTED]
- [REDACTED]

⁵⁰ [REDACTED] HT 317:14-318:2; 321:14-323:2 (Smith); 394:4-395:4 (Peyer); [REDACTED] (Ex. 7) (PCI000047-50). PCI's own documents demonstrated that [REDACTED] HT 403:8-11 (Peyer) (reading from Ex. 26).

⁵¹ See *supra* note 48.

⁵² HT 452:12-17 (Marenzi) (agreeing with counsel that [REDACTED]; see also Wund. Decl. ¶¶ 19-20, 63; HT 194:6-195:19 (Wunderlich); HT 298:15-299:12; 300:14-301:3 (Smith).

⁵³ HT 459:10-13 (Marenzi) [REDACTED]; HT 317:14-318:2 (Smith) [REDACTED] see also Ex. 7 (PCI000048) [REDACTED]

⁵⁴ See HT 359:9-14; 385:10-16; 393:2-13 (Peyer) [REDACTED]
[REDACTED]

PCI is not operating the [REDACTED] as a charity. It is the engine of its service that [REDACTED]

[REDACTED].⁵⁵

PCI next attempts to equate the [REDACTED]
[REDACTED].⁵⁶ NBCUniversal does not dispute that there are several ways to pay for products and services electronically, using credit cards, PayPal, and other types of accounts. Each of these payment methods, however, involves [REDACTED]. As PCI describes it, those payments are “just like real cash.”⁵⁷ [REDACTED]

[REDACTED]⁵⁸

PCI similarly asserts that its [REDACTED]
[REDACTED]⁵⁹ In fact, [REDACTED]
[REDACTED]

[REDACTED] Compare HT 363-378 (Peyer)
(detailing [REDACTED]), with HT 356-363 (Peyer) [REDACTED]
[REDACTED] Exs. 26
(PCI000097-104) and 10 (PCI000109-130).

⁵⁵ See *supra* notes 53-54.

⁵⁶ PCI Opp. at 37-38.

⁵⁷ *Id.* at 49 & n.194.

⁵⁸ The Arbitrator used the nomenclature of [REDACTED] and [REDACTED] in noting this distinction between [REDACTED] and [REDACTED] Phase 1 Dec’n at 10.

⁵⁹ PCI Opp. at 40-41.

“real cash.”⁶⁰ The arbitration record further showed that promotions on services like [REDACTED] are a limited exception in terms of overall transactions, *de minimis* in nature, not based on the [REDACTED] and typically designed to spur further cash purchases of content (e.g., through registering a [REDACTED] device).⁶¹ [REDACTED]

[REDACTED] the distinguishing aspect of PCI’s service is its [REDACTED]
[REDACTED]

[REDACTED]⁶² PCI’s service turns what is at most a limited exception on other services into the rule.⁶³

PCI also touts that its users can pay for content in the [REDACTED]
[REDACTED].⁶⁴ If PCI users in fact only paid for NBCUniversal’s restricted content [REDACTED]
[REDACTED] there would be no dispute here. But PCI also

⁶⁰ HT 127:9-21 (Lamprecht) (“Well, in a case of [REDACTED] as an example, they have what’s called a [REDACTED]. So you either pay by credit card and you buy – you buy a card at a retail store with a credit card or with cash, and it’s effectively a one-for-one transfer of U.S. currency to an [REDACTED]”); Wund. Decl. ¶ 52.

⁶¹ HT 144:19-147:2 (Lamprecht); HT 154:6-16 (Madoff); Lam. Decl. ¶ 28; Wund. Decl. ¶¶ 52-59. Notably, neither Mr. Smith nor Mr. DeVitre knew [REDACTED]

[REDACTED] HT 306:6-307:21; 343:7-345:3 (Smith); HT 520:2-19 (DeVitre). The Commission is well aware that Vudu is not running a promotions-based business. *See 14th Video Competition Report* ¶¶ 294-295, 326 (discussing Vudu’s fee-based service and its market share in “Consumer Purchase Transactions”).

⁶² PCI Opp. at 3.

⁶³ PCI mischaracterizes the facts concerning [REDACTED] PCI Opp. at 48-49. [REDACTED] Wund. Sec. Decl. ¶ 56 (Ex. 5, [REDACTED]).

⁶⁴ PCI Opp. at 37.

enables its users to obtain content for free – [REDACTED]

[REDACTED]

[REDACTED].⁶⁵ In short, the fact that users [REDACTED]

[REDACTED]

[REDACTED] it merely affects the degree to which the content is being [REDACTED]

[REDACTED].⁶⁶

PCI further asserts that the [REDACTED]

[REDACTED]

[REDACTED].⁶⁷ But the fact that the [REDACTED]

[REDACTED] is irrelevant. What matters is how the

user [REDACTED] A user who [REDACTED]

[REDACTED] It is thus not credible to say that a user who [REDACTED]

[REDACTED] The

true cost to the user plainly [REDACTED]

[REDACTED].⁶⁸ As PCI makes clear on its website, users of the service can obtain premium content without having to “reach into [their] wallet.”⁶⁹

⁶⁵ Phase 1 Dec’n at 9-10.

⁶⁶ HT 194:11-19 (Wunderlich); Mad. Decl. ¶ 37; Mad. Sec. Decl. ¶¶ 20, 30; Wund. Sec. Decl. ¶ 7(h).

⁶⁷ PCI Opp. at 38.

⁶⁸ HT 887:14-20 (Madoff) (Mr. Madoff explained that [REDACTED]
[REDACTED]
[REDACTED])

⁶⁹ <http://www.projectconcord.com/aboutus> (last visited Aug. 10, 2012).

PCI next claims that its service is not [REDACTED] [REDACTED]

[REDACTED]

[REDACTED].⁷⁰ This of course is based on the same pretense that PCI users [REDACTED]

[REDACTED] They do not. Moreover, when these [REDACTED]

[REDACTED].⁷¹ [REDACTED]

[REDACTED].⁷² It is thus incorrect for PCI to claim that it [REDACTED]

[REDACTED]⁷³ PCI's service is as much a form of [REDACTED] as other services that involve [REDACTED]⁷⁴ There are other [REDACTED]

[REDACTED]

[REDACTED] For example, Hulu content providers receive [REDACTED] from Hulu, [REDACTED]

[REDACTED].⁷⁵

⁷⁰ PCI Opp. at 38-39.

⁷¹ See Ex. 63 (PCI's patent application states that: "[T]he consumer may be motivated to receive and consume . . . such ads for the purpose of receiving relevant, useful advertisements, and/or to receive compensation for use as possible payment toward past or future consumption of any desired information content. Such payment for desired information content resulting from the consumption of ads is herein referred to as 'advertiser-supported' payment, and any payment for desired information content that is not advertiser-supported is herein referred to as 'consumer supported' payment." *Id.* at 6).

⁷² Ex. 3, Peer Deal § 10, Ex. B.

⁷³ PCI Opp. at 40.

⁷⁴ See HT 68:21-69:9 (Roberts); HT 85:8-86:9 (Casino); HT 124:21-126:6 (Lamprecht); HT 151:7-18 (Madoff); HT 193:21-195:19 (Wunderlich).

⁷⁵ 14th Video Competition Report ¶¶ 332-333.

PCI's attempt to minimize the relevance of its patent application is likewise unavailing.⁷⁶

The selected excerpt that PCI quotes in its Opposition is the *same one* that the Arbitrator cited in his Phase 1 Decision, where he found that the [REDACTED]

[REDACTED] As the Arbitrator noted, PCI's:

application very explicitly purports to patent "a system and method of enabling over a distributed, network computer system, negotiated transactions between an information content owner, an advertiser, and a consumer, in which the consumer can earn electronic credit for viewing targeted advertisements delivered by the advertiser and use the earned credit to access information content from the information content owner."⁷⁷

This and other parts of the patent application, which references [REDACTED]

[REDACTED] the content that it licenses

from NBCUniversal and others. Indeed, as the Arbitrator found (and PCI's experts agreed), this

[REDACTED]⁷⁸

Finally, PCI contends that [REDACTED]

[REDACTED]⁷⁹ Of course,

⁷⁶ PCI Opp. at 41-42. Although PCI asserts that the patent application "does not provide evidence" of how PCI's service works, PCI nowhere disputes the accuracy of the descriptions of its service in the patent application or the distinctions it expressly draws between "advertiser-supported" payments and "consumer-supported" payments. See *supra* note 71.

⁷⁷ Phase 1 Dec'n at 10.

⁷⁸ *Id.* PCI's experts likewise conceded that the primary reason [REDACTED] HT 965:5-966:10 (Murray/DeVitre); see also HT 403:8-11 (Peyer) (reading from Ex. 26) [REDACTED]

⁷⁹ PCI Opp. at 39.

NBCUniversal – not Comcast – is licensing programming to PCI here. And NBCUniversal’s contract defenses are not based on [REDACTED] They are instead based on [REDACTED]

[REDACTED] The [REDACTED] against [REDACTED]

[REDACTED] of content in the relevant NBCUniversal agreements are intended to prevent other services from [REDACTED]

licensed programming.⁸⁰ The [REDACTED] of PCI’s service does exactly what these common and reasonable restrictions are intended to prohibit.⁸¹ That is what matters under these contracts, not PCI’s self-serving descriptions of its service.⁸²

⁸⁰ See Rob. Decl. ¶¶ 12-18; HT 67:19-68:10 (Roberts); Wund. Decl. ¶¶ 24-26; Mad. Decl. ¶¶ 30-31; Mad. Decl. Exs. C-2 (entire representative contracts Exs. 41-47, 58-60), C-3 (entire representative contracts Ex. 48A-E), C-4 (entire representative contracts Exs. 49-57).

⁸¹ Peyer Decl. ¶¶ 22-23 [REDACTED]

(Ex. 10) (PCI000111)

Wund. Decl. ¶ 26

⁸² Contrary to PCI’s claim that NBCUniversal “never intended to provide [PCI] with comparable programming,” PCI Opp. at 5, from the start NBCUniversal offered PCI significant film and TV content that was not subject to these other contractual restrictions. In addition, PCI misrepresents the testimony of NBCUniversal executive Ronald Lamprecht. *Id.* at 5 n.23. He did not state that NBCUniversal never intended to do business with PCI, but rather directed PCI to a different group within NBCUniversal that handles the licensing of content to [REDACTED]

See HT 130:6-133:13 [REDACTED]

Further, PCI first sent a proposed term sheet to NBCUniversal in late August and met with NBCUniversal representatives in early September of 2011. NBCUniversal provided PCI with a copy of the conditions on September 14, 2011. HT 420:6-22-421:8 (Peyer). PCI’s claim that NBCUniversal failed to provide a copy of the conditions for “two months” is based on a letter requesting an initial meeting and mischaracterizes NBCUniversal’s obligations under the *Order*.

**B. Providing Restricted Film And TV Content To PCI's [REDACTED]
Would Breach Numerous NBCUniversal License Agreements.**

Because PCI not only permits but promotes [REDACTED] to licensed programming [REDACTED] its service violates the [REDACTED] in the representative license agreements that NBCUniversal presented during the arbitration. In its Opposition, PCI again tries to obfuscate this fact by repeating the same false premise that its users [REDACTED]

PCI posits that “NBCU’s entire defense rests on the absurd idea that [REDACTED]
[REDACTED]
[REDACTED]⁸³ In fact, NBCUniversal’s licensees impose these [REDACTED] *precisely* because they care whether a consumer [REDACTED]

[REDACTED] Having invested in highly valuable programming – often for tens to hundreds of millions of dollars – these licensees reasonably expect that the same content will not be devalued by being simultaneously available to consumers elsewhere [REDACTED].⁸⁴

[REDACTED] **Agreements.** As shown in the Petition, [REDACTED]
its licensed films during certain periods where (1) [REDACTED]
[REDACTED] and (2) [REDACTED]
[REDACTED].⁸⁵ The unambiguous meaning

⁸³ PCI Opp. at 29.

⁸⁴ See HT 68:21-69:9 (Roberts); HT 85:8-86:9 (Casino); HT 124:21-126:6 (Lamprecht); HT 151:7-18 (Madoff); HT 193:21-195:19 (Wunderlich).

⁸⁵ See NBCUniversal Pet. at 30-35 (quoting and citing the relevant [REDACTED] provisions).

and effect of these and similar restrictions in NBCUniversal's contracts can be seen in how NBCUniversal has consistently required its [REDACTED] licensees to comply with them, with broad prohibitions on both [REDACTED]⁸⁶ Although PCI claims in its Opposition that it satisfies each of these requirements, in fact it violates both.

First, PCI wrongly argues that the application of PCI [REDACTED] complies with the [REDACTED] requirement.⁸⁷ But this requirement specifically addresses – and prohibits – [REDACTED]
[REDACTED]
[REDACTED].⁸⁸ PCI simply ignores that the [REDACTED]
[REDACTED], none of which PCI satisfies.⁸⁹ PCI's service is the opposite of these exceptions [REDACTED]
[REDACTED]
[REDACTED] PCI's [REDACTED]
service is thus a per se violation of [REDACTED] requirement.

⁸⁶ NBCUniversal's common language in dozens of [REDACTED] agreements provides that:

(1) [REDACTED] and (2) [REDACTED]
[REDACTED] Ex. 40A-Z; Wund. Decl. Ex. F; HT 231:18-233:1 (Wunderlich); Lam. Decl. ¶ 27. The parenthetical in the latter requirement – [REDACTED]
[REDACTED] shows that it is irrelevant that [REDACTED]

[REDACTED] See, e.g., PCI Opp. at 44, 46. What matters is whether the [REDACTED]
[REDACTED]

⁸⁷ *Id.* at 43-45.

⁸⁸ See NBCUniversal Pet. at 31 (quoting and citing the relevant [REDACTED] provisions).

⁸⁹ *Id.* (emphasis added).

Second, PCI contends that it complies with [REDACTED] prohibition against [REDACTED]

[REDACTED]

[REDACTED] fares

no better.⁹⁰ In particular, PCI asserts that it fits within [REDACTED] limited exception for [REDACTED]

[REDACTED]⁹¹ [REDACTED]

[REDACTED]⁹² As shown, however, the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] in direct contravention of [REDACTED]

restrictions.

Finally, PCI notes that NBCUniversal and [REDACTED]

for certain types of new services, and suggests that PCI should similarly benefit [REDACTED]

[REDACTED].⁹³ Yet this very [REDACTED] *reaffirmed*

[REDACTED] broad prohibition against [REDACTED]

[REDACTED] In other words, [REDACTED] already anticipated and prohibited

⁹⁰ See *id.* at 32 (quoting and citing the relevant [REDACTED] provisions) (emphasis added). This language ([REDACTED]) makes clear that the restriction against [REDACTED]

[REDACTED] wrongly tries to cabin it, *see, e.g.*, PCI Opp. at 35, 41, 46, but covers any exhibition where [REDACTED] As the arbitration record established, this broader [REDACTED] restriction reflects the industry norm. See Mad. Decl. ¶¶ 24, 40; Cas. Decl. ¶ 17, 22; Rob. Decl. ¶ 27; *see also* Mad. Sec. Decl. ¶ 16. Notably, the Arbitrator observed that contracts that [REDACTED] read more favorably in support of a claim of breach.” Phase 2 Award at 10.

⁹¹ PCI Opp. at 45-46.

⁹² HT 396:19-397:2; 402:7-12 (Peyer); *see also* HT 908:8-909:20 (DeVitre).

⁹³ PCI Opp. at 46-47.

PCI's type of service.⁹⁴ Of course, the [REDACTED] provision in the [REDACTED] contracts would allow NBCUniversal to [REDACTED]

[REDACTED]⁹⁵ As the record shows, PCI has consistently thwarted any such effort.⁹⁶

[REDACTED] **Agreements.** PCI similarly contends that it complies with the [REDACTED] provision in NBCUniversal's license agreements with [REDACTED] which (like [REDACTED]) imposes a [REDACTED]

[REDACTED] This contention is based on the same pretense that PCI associates [REDACTED]⁹⁷ In fact, PCI users who [REDACTED]

[REDACTED] in these circumstances, in violation of the [REDACTED] agreements.⁹⁸

NBCUniversal's Other Contracts. As shown in the Petition, numerous NBCUniversal license agreements for television programming, as well as its MVPD agreements, also restrict

[REDACTED] during the relevant licensing periods and/or require the [REDACTED]
[REDACTED]⁹⁹ PCI asserts that it complies with each of these [REDACTED]

⁹⁴ HT 887:19-888:2 (Madoff) [REDACTED].

⁹⁵ See NBCUniversal Pet. at 34 & nn.98-100. The [REDACTED] requires NBCUniversal to obtain [REDACTED] *Id.*

⁹⁶ PCI views [REDACTED] in the industry, asserting that if [REDACTED] [REDACTED] PCI Opp. at 47. Yet, to date, that confidence has not extended to permitting NBCUniversal to invoke its [REDACTED] [REDACTED] to provide its licensed films to PCI. See NBCUniversal Pet. at 8, 34.

⁹⁷ PCI Opp. at 47.

⁹⁸ Cas. Decl. ¶¶ 19-20, Ex. B; HT 87:7-18 (Casino); Mad. Decl. ¶ 29; Mad. Sec. Decl. ¶¶ 13-14; see NBCUniversal Pet. at 34-35.

⁹⁹ NBCUniversal Pet. at 35-40.

██████████ as well, arguing that they do not ██████████

██████████¹⁰⁰ This is more of the same obfuscation. NBCUniversal's other licensees impose these restrictions to ensure that the value of their licensed content is not diluted by ██████████. The whole point of the ██████████

██████████ PCI violates these requirements.¹⁰¹

C. The Fact That The ██████████ Peer Deal Is Styled As A ██████████ Is Irrelevant To The Contract Defense Analysis.

PCI also argues that because the ██████████ Peer Deal is styled as, and has the "attributes" of, a ██████████ this proves that PCI's service is transactional and not ██████████.¹⁰² The label of the Peer Deal does not change the actual nature of PCI's

¹⁰⁰ PCI Opp. at 48.

¹⁰¹ See HT 68:21-69:9 (Roberts); HT 85:8-86:9 (Casino); HT 124:21-126:6 (Lamprecht); HT 151:7-18 (Madoff); HT 193:21-195:19 (Wunderlich). In contrast to the extensive factual and expert testimony NBCUniversal marshaled in presenting these contract defenses, PCI's first expert witness, Mr. Marenzi broadly opined that NBCUniversal would not "be violating any of its existing agreements by providing PCI with its current programming," Marenzi Decl. ¶ 9, but later admitted that he did not even read *one* of the relevant contracts, HT 463:9-464:17. PCI's second witness, Mr. DeVitre, claimed that he read the contracts but likewise broadly opined that none of them would be breached on the theory that PCI users ██████████ ██████████ DeVitre Decl. ¶¶ 29, 33-39. Thus, in his view (and contrary to what the Arbitrator himself found), there is no ██████████ PCI's service. *Id.*; HT 909:13-20 (DeVitre). The Commission can weigh the relative credibility of these witnesses in its *de novo* review of the record. See *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd 18099, ¶ 15 n.84 (2010) (determining, contrary to the findings in the arbitration award, that Time Warner Cable's industry expert's testimony should be accorded more weight than MASN's), *aff'd*, *TCR Sports Broad. Holding, L.L.P. v. FCC*, 679 F.3d 269 (4th Cir. 2012); *Order*, App. A, § VII.E.1.

¹⁰² PCI Opp. at 33-36.

service.¹⁰³ Nor does it bind how NBCUniversal licensees will view PCI's service in relation to their separate contractual rights under the representative NBCUniversal license agreements.

Indeed, the "attributes" of the [REDACTED] Peer Deal that PCI describes are irrelevant to the contract defense analysis. PCI notes, for example, that under the Peer Deal [REDACTED]
[REDACTED]¹⁰⁴ As shown above, while this technically may be true with respect to PCI's [REDACTED] it ignores that PCI users can obtain licensed content there for [REDACTED] PCI also notes that it must [REDACTED]

[REDACTED]¹⁰⁵ But this again obscures things. The payment PCI makes to [REDACTED] whenever any PCI users [REDACTED]
[REDACTED] That is [REDACTED] It is irrelevant how [REDACTED] PCI further asserts that the Peer Deal expressly [REDACTED]

¹⁰³ PCI also argues that if it were an [REDACTED] service, an "entirely different" division of [REDACTED] would have been responsible for the Peer Deal. PCI Opp. at 27, 33 (relying entirely on the testimony of its expert witness, Mr. DeVitre). This claim is irrelevant to NBCUniversal's contract defenses, and, in all events, it was unproven. During the hearing, PCI wrongly argued that Mr. DeVitre speaks authoritatively for [REDACTED]. See HT 1050:5-16 (MacHarg) ("At one point, Mr. Murray said . . . we don't have [REDACTED] here to ask. Actually, you do. . . . That's [REDACTED] That's Mr. DeVitre. . . . [REDACTED] is here."). But Mr. DeVitre's claims about [REDACTED] should not be credited. Mr. DeVitre [REDACTED]
[REDACTED] HT 950:22-951:4. When asked to opine on how [REDACTED] in the Peer Deal compares to other [REDACTED], Mr. DeVitre disclaimed specific knowledge of [REDACTED] licensing practices: "I don't recall whether I've seen that language in - I mean, [REDACTED] contracts. It's been a long time since I - [REDACTED]
[REDACTED] HT 977:4-9.

¹⁰⁴ PCI Opp. at 34.

¹⁰⁵ *Id.*

[REDACTED]
[REDACTED]
[REDACTED] and, indeed, NBCU's own agreement with [REDACTED].¹⁰⁶ In fact, the [REDACTED] that PCI cites (i.e., from §§ [REDACTED] of the Peer Deal) do not impose any restrictions on PCI at all. They instead require [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] which are the central requirements of the [REDACTED] and other NBCUniversal license agreements.¹⁰⁷

PCI additionally contends that another attribute of the Peer Deal, [REDACTED]
[REDACTED] does not mean what it actually says but rather commits [REDACTED] to supply PCI with [REDACTED]
[REDACTED]¹⁰⁸ During the arbitration, however, PCI's witnesses dodged the question whether [REDACTED]
[REDACTED]

[REDACTED].¹⁰⁹ PCI's experts also acknowledged that [REDACTED]

¹⁰⁶ *Id.* at 34-35. [REDACTED] agreement with [REDACTED] was not in evidence.

¹⁰⁷ See Wund. Decl. ¶ 77(a); HT 151:7-154:16; HT 879:3-883:15 (Madoff); Mad. Decl. ¶ 40; Mad. Sec. Decl. ¶¶ 8-11. As noted, that is why NBCUniversal includes this same [REDACTED] agreements – and expressly does not allow [REDACTED]
[REDACTED]

¹⁰⁸ PCI Opp. at 35-36.

¹⁰⁹ HT 969:5-973:15 (DeVitre). PCI similarly attempts to equate the [REDACTED] various other NBCUniversal agreements with [REDACTED] services that give NBCUniversal [REDACTED] to select available content. PCI Opp. at 48-50. This compares apples and oranges. NBCUniversal's [REDACTED] in most of these agreements is constrained by [REDACTED]

[REDACTED] which one of the expert's described as "schmuck insurance." in case [REDACTED]

[REDACTED]¹¹⁰ Indeed, [REDACTED]

[REDACTED]¹¹¹

[REDACTED]

[REDACTED]

[REDACTED]¹¹²

PCI ultimately revised its Phase 2 Final Offer here to not only include [REDACTED] but further agreed (1) immediately [REDACTED] and (2) to [REDACTED] NBCUniversal. These [REDACTED] the risks that NBCUniversal faces for providing certain film and TV programming to PCI due to the restrictions on [REDACTED] of this content in the relevant NBCUniversal license agreements.

In the end, the contracts that matter here are those of NBCUniversal's licensees – and not the "attributes" [REDACTED] of the Peer Deal. The contract defenses authorized in the Benchmark

[REDACTED] agreement. Wund. Decl. Ex. F (listing different types of [REDACTED] provisions in [REDACTED]); HT 722:12-726:14 (explaining that only a handful of NBCUniversal's [REDACTED] agreements are [REDACTED]). Nor do these [REDACTED] agreements permit [REDACTED]. See Lam. Decl. ¶ 27. Thus, they do not implicate content that is restricted from [REDACTED] like PCI. See *supra* note 86.

¹¹⁰ HT 465:9-22 (Marenzi).

¹¹¹ Ex. 3, Peer Deal § 18(b)(v).

¹¹² HT 348:10-22 (Smith) (noting that [REDACTED]).

Condition are intended to preserve those reasonable and common provisions, honor the rights and interests of other licensees, and protect NBCUniversal – and by extension, PCI, as an indemnitor – from the risks and consequences of breaching these provisions. The “breach first/fix later” approach adopted by the Arbitrator turns these intended protections on their head.¹¹³

V. THE COMMISSION CAN AND SHOULD CLARIFY THE PROCEDURAL AMBIGUITY IN THE BENCHMARK CONDITION.

Finally, PCI asserts that it would be inappropriate for the Commission to clarify whether it meant for the contract defenses authorized under the Benchmark Condition to be addressed during Phase 1 or Phase 2 of an arbitration, on the ground that this procedural ambiguity made no difference to the Arbitrator’s rulings.¹¹⁴ Without such clarification, however, confusion over this procedural question is likely to recur in future Benchmark arbitrations. It is therefore not only appropriate but incumbent for the Commission to address this question.¹¹⁵ As the author of

¹¹³ PCI ironically points to “industry practice” where studios “work with their licensing partners to make room for” new types of distribution and contends that NBCUniversal should be willing to do the same for PCI’s new kind of service. PCI Opp. at 50-52. As shown, PCI has affirmatively prevented such attempts here. PCI further asserts that there was no evidence that [REDACTED] are typically [REDACTED] in “rights conflict” situations. *Id.* at 52. This ignores the fact that some of the NBCUniversal license agreements, like the [REDACTED] contract, have [REDACTED] if NBCUniversal contravenes its obligations, as well as the harms a breach can cause to business relationships and future licensing negotiations. Moreover, the contract defenses are not just intended to avoid the risks of such damages, including [REDACTED] but also to respect the rights and interests of other NBCUniversal licensees.

¹¹⁴ *Id.* at 52-53.

¹¹⁵ See, e.g., *Verizon Telephone Cos., et al. v. Madison Square Garden, L.P., et al.*, 26 FCC Rcd 13145, ¶ 20 (2011) (“[a]n agency may, through adjudication, interpret an ambiguous term in . . . its regulations” as an alternative to notice-and-comment rulemaking); *Telerent Leasing Corp., et al.*, 45 F.C.C.2d 204, ¶¶ 21-22 (1974) (the Commission is “not obliged to . . . await some definitive action . . . which creates a conflict” but instead is “vested by statute with broad and discretionary powers . . . including the clarification of the scope and effect of rulings issued by us . . . it is particularly appropriate in the instant case to take action by way of a declaratory

the condition, the Commission is “uniquely” qualified to clarify its intended procedure.¹¹⁶ A further “rulemaking” proceeding is not required, as PCI wrongly contends.¹¹⁷

Because the contract defenses authorize NBCUniversal to decline to provide video programming to an OVD when doing so would constitute a breach of another licensee’s agreement, an arbitrator’s ruling on these issues may significantly affect the appropriate scope of programming at issue. For the reasons shown in the Petition, it makes no sense to defer this ruling until after the parties have already submitted their final offers in the form of agreements. Rather, the scope of programming covered by the final agreements should be resolved first, as part of Phase 1 of an arbitration, and not left as a “moving target” for resolution at the very end of the proceeding, during Phase 2.¹¹⁸

NBCUniversal believes that the Commission intended for the relevant provisions of the *Order* to be read (and to operate) in this way, which is logical and would promote efficiency by having all of the issues pertaining to the appropriate scope of Comparable Programming resolved at the outset of an arbitration, before the parties are required to submit their final agreements. Accordingly, the Commission should clarify that this is its intended procedure.

judgment in order to remove or alleviate the uncertainty and confusion that has been created with respect to the application and effects of our [prior order]”).

¹¹⁶ See *Fox Sports Net Ohio, LLC v. Massillon Cable TV, Inc.*, 25 FCC Rcd 16054, ¶ 8, n.45 (2010) (“[T]he arbitration provision at issue here was adopted by the Commission, thus making the Commission uniquely qualified to interpret its scope.”).

¹¹⁷ PCI Opp. at 53.


¹¹⁸ NBCUniversal Pet. at 42-44.

VI. CONCLUSION

For these and the other reasons shown in the Petition, NBCUniversal respectfully requests that the Commission (1) reverse the Arbitrator's ruling on the definition of Video Programming and hold that films less than one year from theatrical release are expressly excluded from the scope of Video Programming subject to the Benchmark Condition; (2) reverse the Arbitrator's ruling on NBCUniversal's contract defenses, clarify the proper standard for establishing the contract defenses under the Benchmark Condition, and find that NBCUniversal has shown by a preponderance of the evidence that providing certain film and television programming to PCI would constitute a breach of the representative NBCUniversal license agreements; and (3) clarify that the contract defenses authorized under the Benchmark Condition should be considered and decided during Phase 1 of an arbitration.

Dated: August 10, 2012

Respectfully submitted,



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VERIFICATION

I, David P. Murray, do hereby declare and state under penalty of perjury as follows:

1. I am a partner in the law firm of Willkie Farr & Gallagher LLP, and
2. I have read the foregoing Reply in Support of Petition for *De Novo* Review ("Reply"). To the best of my personal knowledge, information, and belief, the statements made in this Reply, other than those of which official notice can be taken, are well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. The Reply is not interposed for any improper purpose.

August 10, 2012
August 10, 2012

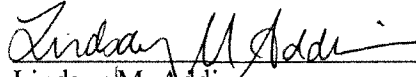
David P. Murray/dm
David P. Murray

CERTIFICATE OF SERVICE

I, Lindsay M. Addison, hereby certify that on August 10, 2012, I caused true and correct copies of the enclosed Reply in Support of Petition for *De Novo* Review to be served by hand delivery to the following, except for those marked by (*), who were served by overnight delivery.

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